Federal Court Cour fédérale

Date: 20100225

Docket: T-1537-08

Citation: 2010 FC 226

Ottawa, Ontario, February 25, 2010

PRESENT: The Honourable Leonard S. Mandamin

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

MICHAEL PEPPER

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Attorney General applies for judicial review of the September 5, 2008 decision of the Adjudicator, Michele A. Pineau, of the Public Service Labour Relations Board (*Michael Pepper v. Deputy Head (Department of National Defence*), 2008 PSLRB 71). The decision concerns the remedial award for a grievance by Michael Pepper that the Adjudicator has previously allowed.

BACKGROUND

[2] The grievor, Michael Pepper, is a systems electronic technician with the Department of National Defence (DND) at Cape Scott, Nova Scotia. He had been employed with DND since 1977.

[3] Mr. Pepper's employment was terminated on July 14, 2006 due to an inablility to attend work for medical reasons. He had been on medical leave since 1999. At the time of his dismissal he was on sick leave without pay.

[4] Mr. Pepper had two grievances before the Adjudicator. The first, initiated January 16, 2002, alleged management mistreated him to the point of causing him to become ill and unable to perform his duties. Mediation of this harrassment grievance conducted between September 11, 2003 and March 17, 2006 was unsuccessful. Mr. Pepper's employment was terminated four months later.

[5] Mr. Pepper's second grievance, filed July 16, 2006, was that his dismissal from employment was illegal.

[6] The Adjudicator dismissed the harrassment grievance but found Mr. Pepper's dismissal was unlawful because the employer breached the confidentiality of the mediation process. She found it used medical information submitted in the privileged forum of mediation to terminate Mr. Pepper's employment. The Adjudicator also found the employer failed to accommodate the

grievor to the point of undue hardship. The Adjudicator's Reasons for Decision are set out in *Pepper v. Treasury Board (Department of National Defence)* 2008 PSLRB 8 (*Pepper 1*).

[7] The Adjudicator ordered Mr. Pepper reinstated in the position he held at the time of his termination and "entitled to benefits and wages, if that is the case." The Adjudicator took the question of a remedial award under reserve and gave the parties 60 days to come up with an agreement on indemnity.

[8] The parties were unable to come to an agreement on indemity. After exchange of submissions on the issue of indemnity, the Adjudicator awarded Mr. Pepper salary, employment benefits and lost overtime opportunities retroactive to date of termination, $9000 for pain and suffering, $8000 as additional compensation and interest.

DECISION UNDER REVIEW

[9] The portion of the Adjudicator's decision under review involves the award of salary, employment benefits and lost overtime opportunities retroactive to date of termination. The other portions of the Adjudicator's award under the *Canada Human Rights Act*, (R.S.C., 1985, c. H-6) (*CHRA*) and other compensation are not challenged.

[10] In coming to a remedial award, the Adjudicator first reviewed her earlier decision on the termination adjudication where she had stated:

> It is my decision with regard to a remedial award is taken under reserve. The parties are given 60 days to come to an agreement concerning such

> indemnity as may be owed to the grievor. Should the parties be unable to come to an agreement, I will receive their representations on a remedial award by an exchange of written submissions, no later than 90 days following the issuing of these reasons.
> …
> The grievor is reinstated in the position he held at the time of his termination and entitled to benefits and wages, if that is the case.
> I retain jurisdiction on the issue of a remedial award with respect to PSLRB No. 566-02-767 for a period of 90 days.

[11] The Adjudicator then reviewed the parties' respective positions. The grievor claimed compensation for lost wages and benefits retroactive to the date of reinstatement, compensation for losses incurred because of the cancellation of those benefits retroactive to the start of his medical leave and leave with pay retrospective to April 1, 2005, the date on which the PSLRB was authorized to interpret and apply the provisions of the *CHRA*.

[12] The respondent (now Applicant) had submitted that an award of $7000 and reinstatment fully compensates the grievor for pain and suffering related to termination of employment. The Adjudicator reiterated the respondent's position:

> [15] … Furthermore, at the time of his termination, the grievor was on leave without pay, and with the caveat that the grievor is entitled to benefits and wages "if that is the case," as per paragraph of 2008 PSLRB 8, my decision expressly envisions that the grievor was not medically fit to be in the workplace at the time of his termination. Accordingly, he should be restored to this pre-termination status.
> …
> [26] The respondent takes the postion that because the grievor was on leave without pay at the time of his termination, I can only put him back into the position he was at the time of termination, that is, on leave without pay, and therefore no compensation is payable under this head.

[13] The Adjucator did not accept the respondent's submission referring in part to the *Public Service Labour Relations Act*, (2003, c. 22, s. 2) (*PSLRA*):

> [27] In the circumstances of this case, I take the view that the damages owed to the grievor as a result of his termination are not particular to the employer's breach of the *CHRA*, but come under my general remedial authority as an adjudicator under subsection 228(2) of the *PSLRA* as in any other case involving a termination. A reinstated employee is normally entitled to be compensated for his salary, lost overtime opportunities, benefits and any losses incurred as a result of the cancellation of his benefits, retroactive to the date of reinstatement. …
>
> [28] In my decision, at paragraph 169, I stated that "[t]he grievor is reinstated in the position he held at the time of this termination and entitled to benefits and wages, <u>if that is the case</u> [emphasis added]." My understanding of the grievor's status at the time of adjudication of his grievances was that he was receiving worker's compenstaion benefits. Accordingly, there is no compensation owing by the respondent before the date of grievor's termination since he was receiving statutory benefits for which he applied."

[14] In the course of considering the claim for an award for pain and suffering, the Adjudicator returned to the subject of the the grievor's leave without pay noting:

> [31] … I also held that although the grievor was on work-related medical leave, the respondent took no interest in his medical well-being until time came to terminate his employment, and at that time the respondent did not heed the recommendations of the grievor's physician that he could be accommodated back into the workplace.

[15] In result the Adjudicator awarded, in addition to damages for pain and suffering under paragraph 53(2)(e) of the *CHRA* and additional compensation under subsection 228(2) of the *PSLRA* and subsection 53(3) of the (*CHRA*), the following:

1) salary retroactive to the date of termination under subsection 228(2) of the *PSLRA*;

2) lost overtime opportunities retroactive to the date of termination under subsection 228(2) of the *PSLRA*;

3) employment benefits retroactive to the date of termination under subsection 228(2) of the *PSLRA*.

[16] The Adjudicator retained jurisdiction with respect to all aspects of this remedial award for a period of 60 days for the purpose of implemeting the award.

LEGISLATION

[17] The relevant sections of the *PSLRA* provide:

223. (1) A party who refers a grievance to adjudication must, in accordance with the regulations, give notice of the reference to the Board and specify in the notice whether an adjudicator is named in any applicable collective agreement or has otherwise been selected by the parties and, if no adjudicator is so named or has been selected, whether the party requests the establishment of a board of adjudication.	223. (1) La partie qui a renvoyé un grief à l'arbitrage en avise la Commission en conformité avec les règlements. Elle précise dans son avis si un arbitre de grief particulier est déjà désigné dans la convention collective applicable ou a été autrement choisi par les parties, ou, à défaut, si elle demande l'établissement d'un conseil d'arbitrage de grief.
(2) On receipt of the notice by the Board, the Chairperson must	(2) Sur réception de l'avis par la Commission, le président :
(a) if the grievance is one arising out of a collective agreement and an adjudicator is named in the agreement, refer the matter to the adjudicator;	a) soit renvoie l'affaire à l'arbitre de grief désigné dans la convention collective au titre de laquelle le grief est présenté;
(b) if the parties have selected an adjudicator, refer the matter to the	b) soit, dans le cas où les parties ont choisi un arbitre de grief, renvoie l'affaire à celui-ci;
	c) soit institue, sur demande d'une partie et à condition que

adjudicator;

(c) if a board of adjudication has been requested and the other party has not objected in the time provided for in the regulations, establish the board and refer the matter to it; and

(d) in any other case, refer the matter to an adjudicator designated by the Chairperson from amongst the members of the Board.

…

228. (1) If a grievance is referred to adjudication, the adjudicator must give both parties to the grievance an opportunity to be heard.

(2) After considering the grievance, the adjudicator must render a decision and make the order that he or she considers appropriate in the circumstances. The adjudicator must then

(a) send a copy of the order and, if there are written reasons for the decision, a copy of the reasons, to each party, to the representative of each party and to the bargaining agent, if any, for the bargaining unit to which the employee whose grievance it is belongs; and

(b) deposit a copy of the order and, if there are written reasons for the decision, a copy of the reasons, with the Executive

l'autre ne s'y oppose pas dans le délai éventuellement fixé par règlement, un conseil d'arbitrage de grief auquel il renvoie le grief;

d) soit, dans tout autre cas, renvoie le grief à un arbitre de grief qu'il choisit parmi les membres de la Commission.

…

228. (1) L'arbitre de grief donne à chaque partie au grief l'occasion de se faire entendre.

(2) Après étude du grief, il tranche celui-ci par l'ordonnance qu'il juge indiquée. Il transmet copie de l'ordonnance et, le cas échéant, des motifs de sa décision :

a) à chaque partie et à son représentant ainsi que, s'il y a lieu, à l'agent négociateur de l'unité de négociation à laquelle appartient le fonctionnaire qui a présenté le grief;

b) au directeur général de la Commission.233. (1) La décision de l'arbitre de grief est définitive et ne peut être ni contestée ni révisée par voie judiciaire.

(2) Il n'est admis aucun recours ni aucune décision judiciaire — notamment par voie d'injonction, de certiorari, de prohibition ou dequo warranto — visant à contester, réviser, empêcher ou limiter l'action de l'arbitre de grief exercée dans le cadre de la

Director of the Board.	présente partie.
233. (1) Every decision of an adjudicator is final and may not be questioned or reviewed in any court.	
(2) No order may be made, process entered or proceeding taken in any court, whether by way of injunction, certiorari, prohibition, quo warranto or otherwise, to question, review, prohibit or restrain an adjudicator in any of the adjudicator's proceedings under this Part.	

STANDARD OF REVIEW

[18] The Supreme Court of Canada has held in *Dunsmair v. New Brunswick*, 2008 SCC 9 (*Dunsmuir*) there are two standards of review: correctness and reasonableness. The previous standards of reasonbleness *simplicter* and patent unreasonableness are collapsed into the single standard of reasonableness (*Dunsmuir*, para. 45). The Supreme Court also held that where the standard of review has been previously determined, there is no need to conduct a new standard of review analysis (*Dunsmuir*, para. 57).

[19] The parties both agree the Adjudicator's decision is reviewable on a standard of reasonableness.

[20] The standard of review for an adjudicator's decision acting within jurisdiction under the *PSLRA* has been found to be that of reasonableness: *Bellavance v. Canada* (Human Resources Develpoment Canada), [2000] F.C.J. No. 1284 at paras. 38-41, *Robillard v. Canada (Attorney General),* 2008 FC 510 at paras. 23-24.

[21] Accordingly, I will review the Adjudicator's decision on the deferential standard of reasonableness.

ANALYSIS

[22] The Applicant submits the Adjudicator's decision was unreasonable in ordering salary, benefits and lost overtime to an employee who was unfit to work. Further, the Adjudicator's decision contained little analysis and few reasons.

[23] The Applicant argues the Adjudicator offers no justification for why the Respondent would be entitled to salary, benefits or lost overtime opportunities to the date of his termination especially since the Adjudicator had recognized the Respondent was not medically fit to return to the workplace and was receiving Worker's Compensation benefits.

[24] The Applicant submits the Adjudicator should have ordered the Respondent returned to his position at the time of the termination: on leave without pay.

[25] The Applicant submits the Adjudicator offers no analysis or review of cases relating to damages awarded in a wrongful termination case such as *Honda Canada Inc. v. Keays*, 2008 SCC 39 or *Bedirian v. Canada (Attoney General),* 2007 FCA 221. Further, the paucity of reasons also warrents intervention by the Court citing Justice Martineau in *Avila v. Canada* (Minister of Citizenship and Immigration), 2006 FC 359 at para. 32:

> Here is the rub: the main flaw of the impugned decision results from a complete lack of analysis of the applicant's personal situation. It is not sufficient for the Board to indicate in its decision that it considered all the documentary evidence. […] Further, because of the laconic nature of the reasons for dismissal contained in the decision, it cannot stand up to somewhat probing examination.

[26] The Respondent submits the Adjudicator's reasons must be read in the context of her previous decision in *Pepper 1* where she decided the Respondent's termination was unlawful.

[27] I agree with the Respondent's submission. The Adjudicator gave lengthy reasons in the preceding decision, retained jurisdiction on a remedial award but reserved for a period of time to allow the parties an opportunity to agree on an appropriate award. When the parties failed to agree, the Adjudicator gave the parties the opportunity to make submissions before issuing the impugned remedial award which included salary, benefits and lost overtime retroactive to date of termination.

[28] The Adjudicator referred to her preceding decision in the reasons for the award:

> "… I also held that although the grievor was on work-related medical leave, the respondent took no interest in his medical well-being until the time came to terminate his employment, and at the time the respondent did not heed the reocmmendations of the grievor's physician that the could be accommodated back into the workplace."

[29] In these circumstances, I see no reason to treat the Adjudicator's award decison in isolation from her earlier decision on unlawful dismissal.

[30] On review of the reasons in the earlier decision, I find the Adjudicator made a clear finding of fact that the Applicant breached its duty to accommodate the Respondent. The Adjudicator accepted evidence from the Respondent's psychiatrist concerning the Respondent's ability to return to work in approximately three months if workplace issues were resolved. After detailed analysis the Adjudicator found the Applicant had failed to accommodate the Respondent:

> 157 Therefore, I come to the inevitable conclusion that the employer decided to terminate the employment of the grievor without taking the steps to make an informed decision. Namely the employer did not seek out useful information from Dr. Rosenberg to assist in its decision-making, nor did it attempt to determine if there was a suitable job available that could accommodate his return to work.
>
> 158 The employer's arguments suggest that the length of the absence was in itself an accommodation since the grievor was unable to return to work for a lengthy period. While the employer provides sick leave, leave without pay and disability benefits as part of its compensation package, doing so does not mean that it fulfilled its obligation to accommodate the grievor to the point of undue hardship in the circumstances of this case. There is no indication that the employer was in regular contact with the grievor during his absence or that it committed financial or other resources to accommodate the grievor outside these benefits. In fact, the grievor was

> receiving compensation for a work-related injury. The employer did not seek up-to-date medical information about the grievor for two years before its decision to terminate his employment. Given the size of the employer's organization, its resources and expertise, I have some difficulty understanding why the employer did not take a greater initiative in suitably accommodating the grievor's return to work before the definitive decision to terminate his employment. An ultimatum based on a lengthy mediation process unrelated to ending the grievor's employment is not an accommodation argument. The grievor was not entitled to a perfect solution, but he was entitled to a full consideration of his restrictions and how they could be accommodated within the employer's policies and the jobs available.
>
> 159 On the basis of these findings, I conclude that the employer failed to accommodate the grievor to the point of undue hardship.
>
> (emphasis added)

[31] It is clear the Adjudicator found the Respondent was capable of returning to work in appropriate circumstances and that the Applicant breached its duty to accommodate the Respondent.

[32] In *Bellavance v. Canada* (Human Resources Development), [2000] F.C.J. No. 1284, Justice Blais (as he then was) considered the deferential standard of review of decisions by Public Service Board Members relating to cases involving the dismissal of public servants. He noted at paras. 38-40:

> The standard of judicial review of a decision of the Staff Relations Board was raised in Fraser v. Canada (Public Service Staff Relations Board), [1985] 2 S.C.R. 455, where the Chief Justice said at 464:
>
> > A restrained approach to disturbing the decision of specialized administrative tribunals, particularly in the context of labour relations, is

> essential if the courts are to respect the intentions and policies of Parliament and the provincial legislatures in establishing such tribunals ...

In Canada (A.G.) v. Public Service Alliance of Canada, [1991] 1 S.C.R. 614, at 661 and 662, the Supreme Court also maintained:

> It is apparent that the Board's raison d'être is the resolution of labour management disputes that may erupt between the Federal Government and its employees. The area of expertise of the Board is in the field of labour relations involving the Federal Government and its employees.
>
> ... . .
>
> The Board has been given wide powers and the protection of a privative clause. Its members are experienced and skilled in the field of labour relations. The legislator made it clear that labour disputes, such as those presented in this case, were to be resolved by the Board. The Court should not be quick to interfere.

The Supreme Court, explaining the reason for such a standard, indicated in Canada (A.G.) v. Public Service Alliance of Canada, [1993] 1 S.C.R. 941, at 962 and 964:

> There are a number of reasons why the decisions of the Board made within its jurisdiction should be treated with deference by the court. First, Parliament in the Act creating the Board has by the privative clause indicated that the decision of the Board is to be final. Secondly, recognition must be given to the fact that the Board is composed of experts who are representatives of both labour and management. They are aware of the intricacy of labour relations and the delicate balance that must be preserved between the parties for the benefit of society. These experts will often have earned by their merit the confidence of the parties. Each time the court interferes with a decision of such a tribunal confidence is lost not only by parties which must appear before the Board but by the community at large. Further, one of the greatest advantages of the Board is the speed in [sic] which it can hold a hearing and render a decision. If courts were to interfere with decisions of the Board on a routine basis, victory would always go to the party better able to afford the delay and to fund the endless litigation. The court system itself would suffer unacceptable delays resulting from the increased case load if it were to attempt to undertake a routine review.
>
> ...

> It is not enough that the decision of the Board is wrong in the eyes of the court; it must, in order to be patently unreasonable, be found by the court to be clearly irrational.
>
> (emphasis added)

[33] The Adjudicator was clearly cognizant of the Applicant's position the Respondent should be reinstated to leave without pay. The Adjudicator rejected that position. I would add the Applicant's proposal would merely return the situation to the very impasse that led to the Respondent's dismissal by the Applicant. In my view, the Adjudicator was tasked with hearing this labour dispute and may look to outcomes beyond the impasse that initiated it.

[34] The language of section 228(2) of the *PSLRA* expressly gives the Adjudicator a measure of discretion: "After considering the grievance, the adjudicator must render a decision and make the order that he or she considers appropriate in the circumstances."(emphasis added)

[35] The Supreme Court of Canada pronouncements and the privative clause in the PSLRA are clear: the expertise of public service labour relations adjudicators requires significant deference from reviewing courts.

[36] The Adjudicator considered and decided a matter well within her area of expertise. She based her decision on facts found in the evidence before her. The Adjudicator had carefully reviewed the circumstances of the case and set out her findings in reasons given in *Pepper 1*. The award of salary, benefits and lost overtime was within her jurisdiction and discretion.

[37] I find the Adjudicator's decision on the remedial award of wages, benefits and lost overtime retroactive to date of termination is reasonable.

CONCLUSION

[38] The application for judicial review is dismissed.

[39] Costs are awarded to the Respondent.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is dismissed.

2. Costs are awarded to the Respondent.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1537-08
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA and MICHAEL PEPPER
PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
DATE OF HEARING:	JULY 15, 2009
REASONS FOR JUDGMENT AND JUDGMENT:	MANDAMIN, J.
DATED:	FEBRUARY 25, 2010

APPEARANCES:

Neil McGraw	FOR THE APPLICANT
David Mombourquette	FOR THE RESPONDENT

SOLICITORS OF RECORD:

John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Ontario	FOR THE APPLICANT
Pink Breen Larkin Fredericton, New Brunswick	FOR THE RESPONDENT